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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-80

STEVEN LEW QUATTRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

JURISDICTIONAL STATEMENT

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INDEX

Page

CITATIONS ..... ii-iv

INTRODUCTORY STATEMENT 1

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTES INVOLVED 4

QUESTIONS PRESENTED 6

PRESENCE OF FEDERAL QUESTION 6

STATEMENT OF THE CASE 9

THE QUESTIONS ARE SUBSTANTIAL 11

Questions One and Two 11

Question Three 16

WRIT OF CERTIORARI. 17

CONCLUSION 17

APPENDIX 1a-32a

CITATIONS

Page

Cases:

Aguilar v. Texas,
378 U.S. 108 (1964) 17

Alderman v. United States,
394 U.S. 165 (1969) 11

Bantam Books, Inc. v. Sullivan,
372 U.S. 58 (1963) 4

Berger v. New York,
388 U.S. 41 (1967) 11

Cohen v. California,
403 U.S. 15 (1971) 4

Commonwealth v. Vitello,
327 N.E.2d 819 (Mass. 1975) 14

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 17

Dahnke-Walker Milling Co. v. Bondurant,
257 U.S. 282 (1921) 4

Flournoy v. Wiener,
321 U.S. 253 (1944) 17

Katz v. United States,
389 U.S. 347 (1967) 11

Largent v. Texas,
318 U.S. 418 (1943) 8

Quattry v. State,
370 So.2d 461 (Fla. 1979) 2

Quattry v. State,
362 So.2d 64 (Fla. 4th DCA 1978) 2

Page

Scott v. United States,
436 U.S. 128 (1978) 11

Spinelli v. Texas,
393 U.S. 410 (1969) 17

State v. Farha,
218 Kan. 394, 544 P.2d 341 (1975) 14

State v. Siegel,
266 Md. 256, 292 A.2d 86 (1972) 14

State v. McGillicuddy,
342 So.2d 567 (Fla. 2nd DCA 1977) 15

United States v. Carrubia,
377 F. Supp. 1099 (E.D.N.Y. 1974) 14

United States v. Civella,
533 F.2d 1395 (8th Cir. 1976) 12

United States v. Donnovan,
429 U.S. 413 (1977) 13

United States v. Fiorella,
468 F.2d 688 (2nd Cir. 1972) 17

United States v. Giordano,
416 U.S. 505 (1974) 13

United States v. Lanza,
341 F. Supp. 405 (M.D. Fla. 1972) 15, 17

United States v. McCoy,
539 F.2d 1050 (5th Cir. 1976) 12

United States v. Narducci,
341 F. Supp. 1107 (E.D. Pa. 1972) 13

United States v. Robinson,
496 F.2d 225 (5th Cir. 1974) 13

Page

United States v. Tortorello,
480 F.2d 764 (2nd Cir. 1973) 13

Statutes:

Fla. Stat. §934.07 (1977) 1, 3, 4, 6, 7, 8, 12, 16

Title 28 U.S.C.A. §1257(2) 3, 4, 11

Title 28 U.S.C.A. §2103 17

Title 18 U.S.C.A. §§2510-2520 11

Title 18 U.S.C.A. §2516 ..... 1, 13

Title 18 U.S.C.A. §2516(1) 12, 15

Title 18 U.S.C.A. §2516(2) 3, 4, 5, 6, 11, 12, 13, 15

Rules:

Fla. R. App. P. 3.14 (1977) 2

Fla. R. App. P. 9.120 2

Fla. R. Crim. P. 3.172(c)(iv) 10

Sup. Ct. R. 10 3

Sup. Ct. R. 11 3

Legislative Materials:

Fla. Stat. Ann., vol. 24, at 56 (1973) 15

U.S. Code Cong. & Admin. News,
vol. 2 (1968) 11

Constitution:

Fourth Amendment 14

IN THE

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OCTOBER TERM, 1979

No.

STEVEN LEW QUATTRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DISTRICT COURT OF APPEAL OF FLORIDA FOURTH DISTRICT

JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

The Appellant, STEVEN LEW QUATTRY, respectfully appeals that decision of the District Court of Appeal of Florida, Fourth District, entered August 9, 1978, which decision affirmed the denial of Appellant's Motion To Suppress Intercepted Wire Communications by the trial court judge. Upon the issues relevant to this appeal, the Fourth District Court of Appeal held, by per curiam affirmed, that Fla. Stat. §934.07 did not require the application for a wiretap order to be made by the principal prosecuting attorney of the circuit in question, despite Appellant's argument that 18 U.S.C.A. §2516(2) required, to the contrary, the application to be made by the principal prosecuting attorney.

OPINIONS BELOW

The decision of the District Court of Appeal for the State of Florida, Fourth District, was a "Per Curiam" affirmed decision rendered on August 9, 1978, and reported at 362 So.2d 64 (Fla. 4th DCA 1978). Timely petition for rehearing pursuant to Fla. R. App. P. 3.14 (1977), then in effect, was filed. This petition was denied on September 27, 1978. A copy of the Fourth District Court of Appeals *Quattry* decision is contained in the Appendix hereto, p. 3a, *infra*. The decision by the Fourth District Court of Appeal affirmed the order of the circuit court, Ninth Judicial Circuit, in and for Orange County, Florida, entered on February 28, 1977, which denied Appellant's Motion To Suppress Intercepted Wire Communications. A copy of that order can be found at page 30a of the Appendix, *infra*.

Petition for Writ of Certiorari pursuant to Fla. R. App. P. 9.120 was prosecuted by Appellant to the Supreme Court of Florida on the basis of conflict jurisdiction between the decision of the Fourth District Court of Appeal and other courts of appeals within the state. The Florida supreme court denied this discretionary writ on April 19, 1979, and reported at 370 So.2d 461 (Fla. 1979). A copy of this published denial can be found on page 5a of the Appendix, *infra*.

JURISDICTION

This is an appeal from a decision of the District Court of Appeal of Florida, Fourth District, entered on August 9, 1978, which affirmed the trial court's denial of Appellant's Motion To Suppress Intercepted Wire Communications. A petition for rehearing was filed in that court. Also, a motion to certify question as being of great public interest was filed on August 22, 1978. The Fourth District Court of Appeal denied both on September 23, 1978. See p. 4a, *infra*. A petition for a discretionary writ of certiorari was filed in the

Supreme Court of Florida. This was denied on April 19, 1979. See p. 5a, *infra*.

Appellant filed his Notice of Appeal on June 27, 1979, in accordance with Sup. Ct. R. 10 and 11. The Notice of Appeal was filed in the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida, the lower court possessed of the record, on June 27, 1979. A copy of the Notice was filed with the Fourth District Court of Appeal, the court whose decision is sought to be reviewed on this appeal.

The Fourth District Court of Appeal affirmed the denial of the Motion To Suppress Intercepted Wire Communications against the challenge that Fla. Stat. §934.07 (1977) permitted only the State Attorney, as principal prosecuting attorney, to make the application to the appropriate judge for the issuance of an order authorizing wire interception; and if that court construed section 934.07 to allow the type of application present in this case, then section 934.07 permitted more permissive procedures than required by 18 U.S.C.A. §2516(2), from which the former statute was patterned, and therefore was invalid in being repugnant to section 2516(2) which set forth the minimum requirements which govern and control all state statutes.

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C.A. §1257(2).

The validity of Fla. Stat. §934.07 (1977) has been sustained, for purposes of 28 U.S.C.A. §1257(2), since the Fourth District Court of Appeals upheld the validity of Fla. Stat. §934.07 (1977) against the challenge of its being repugnant to 18 U.S.C.A. §2516(2). That court found Fla. Stat. §934.07 applicable to the facts of this case even though Appellant argued that such an application would be invalid on federal grounds, to wit: in contradistinction to 18 U.S.C.A.

§2516(2). On its face Fla. Stat. §934.07 contained no facial invalidity. It did, however, fail to essentially track the statutory language of 18 U.S.C.A. §2516(2) after which it was structured. Thus, construing or applying section 934.07 to authorize the applicational procedures involved herein contravened the minimum constitutional and statutory standards governing state wiretap statutes as set forth in 18 U.S.C.A. §2516(2).

In these types of situations the Supreme Court has held that 28 U.S.C.A §1257(2) has been complied with, and that a state statute has been sustained as being consistent with the federal constitution and statutes. *See Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921).

RELEVANT STATUTES INVOLVED

1. Fla. Stat. §934.07 provides in full:

> Authorization for interception of wire or oral communications. — The Governor, the Attorney General, or any State Attorney may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with this chapter, an order authorizing or approving the interception of wire or oral communications by the Department of Criminal Law Enforcement or any law enforcement agency of this state or any political subdivision thereof having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, burglary, theft, dealing in stolen property, prostitution, criminal usury, bribery, extortion, or dealing in narcotic drugs or other dangerous drugs; any violation of the provisions of the Florida Anti-Fencing Act; or any conspiracy to commit any violation of the laws of this state relating to the crimes specifically enumerated above.

2. 18 U.S.C.A. §2516(2) provides in full:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

QUESTIONS PRESENTED

1. Whether Fla. Stat. §934.07 is invalid as being contrary to the minimum standards applicable to the states as set forth in 18 U.S.C.A. §2516(2) governing the pre-order applicational stage in securing a court ordered wiretap, wherein Fla. Stat. §934.07 was construed and applied to permit application for a wiretap order by persons other than the principal prosecuting attorney as required by 18 U.S.C.A. §2516(2).

2. Whether, as a corollary to Paragraph One (1), 18 U.S.C.A. §2516(2) requires only the principal prosecuting attorney to make application to a state court of competent jurisdiction for an authorized wiretap.

3. Whether there has been any other denial of a federal right whether or not capable in itself of being brought before this Court by appeal.

PRESENCE OF FEDERAL QUESTION

Title 28, section 1257(2) requires a state statute be upheld as valid against the argument that it is repugnant to the Constitution of the United States, its laws or treaties. The Fourth District Court of Appeal held, as applied, Fla. Stat. §934.07 (1977) valid and not repugnant to 18 U.S.C.A. §2516(2).

From the time of the motion to suppress and throughout the state appeals, Quattry raised and argued the fact that the application involved in this case was not in compliance with Fla. Stat. §934.07 (1977), and if so, then the latter provision contravened 18 U.S.C.A. §2516(2).

In the motion to suppress, Quattry alleged:

> The Authorization for Interception of Wire or Oral Communications (Exhibit B) is *prima facie* improper in that it does not meet requirements of Florida Statute 934.07. The Authorization is a failure because State Attorney Robert Eagan did not authorize an Application to a judge as required by law. Instead, the State Attorney erroneously authorized the Application of Agent Ray A. Tomlinson for an Order and said Authorization is fatally at variance with Florida Statute 934.07.
>
> Because Florida Statute 934 is an infringement on basic constitutional rights the statute must be strictly construed and applied with painstaking precision. Neither of these requirements were met and the Court should enter its Order suppressing all intercepted wire communications upon which this cause is totally based.

This motion was denied by the trial court without explanation. (See Record on Appeal p. 31, and p. 30a, *infra.*)

The Assignments of Error contained a similar allegation:

> The trial court erred in denying Defendant's Motion to Suppress Intercepted Wire Communications in that the authorization for interception of wire or oral communication was improper and did not satisfy that requirements of Fla. Stat. §934.07 in that State Attorney Robert Eagan did not authorize an application to a judge as required by law, but instead authorized the application of a sheriff's department agent for the Order sought.

Throughout his brief, Quattry consistently argued the variation between Fla. Stat. §934.07 (1977) as applied, and 18 U.S.C.A. §2516(2). A few examples:

> Appellant submits that such an application procedure, as present in this case, was not in conformity with and therefore violated the requirements of Title III, Omnibus Crime Control and Safe Streets Act of 1968, more specifically 18 U.S.C.A. §2516(2). [Brief p. 18]
>
> * * *
>
> If Chapter 934 allows someone other than the principal prosecuting attorney of any political subdivision, *qua* state attorney, to apply for an order authorizing interception of wire communications, then the Florida act is less restrictive than Title III. In such a situation the federal act must prevail. [*Id.* at 20].
>
> * * *
>
> Section 2516(2) of Title III requires that the principal prosecuting attorney is the only party permitted to apply to the judge for an order. Thus, §934.07 must comply accordingly. If it permits less, then the statute must be invalid. [*Id.* at 40].

In fact, Point III on that appeal was argued as follows:

> The application for an order authorizing interception of wire communications was not in compliance with Title III of the Omnibus Crime Control and Safe Streets Act, and Chapter 934, Florida Statutes.

The reason for placing these excerpts in this jurisdictional statement was to further aid this Court in determining section 1257(2) jurisdiction. The judgment of the Fourth District Court of Appeal was but a one-word affirmance, which inherently makes it difficult to ascertain upon which issue an appeal was decided, or for what reason. This lack of explicitness on the part of state court decisions has not in the past deterred this Court from exercising its proper jurisdiction. *See* Largent v. Texas, 318 U.S. 418 (1943).

STATEMENT OF CASE

On April 12, 1976, Judge B.C. Muszynski, Circuit Court Judge, issued an order authorizing interception of oral and wire communications from telephone number 305-273-1692. See p. 24a, *infra.* Afterwards, on April 13, 1976, the same judge amended this order to require the cooperation of Southern Bell Telephone and Telegraph Company in the interception process. From the date of the order through April 27, 1976, telephone interception was maintained through 24-hour per day monitoring.

The April 12th wiretap order was issued upon the "Affidavit and Application" submitted to the judge by Ray A. Tomlinson, who at the time was a deputy sheriff with the Orange County Sheriff's Department. Deputy Tomlinson was the person physically appearing before the Judge. The "Affidavit and Application" was sworn to before the issuing judge, similar to a search warrant procedure. (See p. 11a, *infra.*) The deputy making the application was not with the State Attorney's Office, the Governor's Office, nor with any special federal or state task force investigating drug crimes.

The "Affidavit and Application" was not signed by the State Attorney, or any other attorney from that office. Nor was the application presented to the judge by any of these referred to individuals. Accompanying the "Affidavit and Application," however, was an "Authorization For Interception Of Wire Or Oral Communications" signed by the State Attorney for the Ninth Judicial Circuit. This Authorization provided in full:

> The undersigned, ROBERT EAGAN, being the duly elected State Attorney for the Ninth Judicial Circuit for the State of Florida, does, pursuant to Section 934.07 Florida Statutes, Hereby Authorize the Application of Agent Ray A. Tomlinson, Special Investigations Division,

> Orange County Sheriff's Department, for an Order of the Ninth Judicial Circuit of Florida, Authorizing the Interception of Wire or Oral Communications on telephone number 305-273-1692. (See p. 23a, *infra.*)

At the time of the Authorization, the "Affidavit and Application" had yet to be verified under oath. Further, the affidavit was replete with hearsay to the affiant from his informants, and what they had heard from others; and also, what other officers had told the affiant, who themselves had heard it from other sources.

The police eventually arrested Quattry on information received from the wiretaps. He was arrested while in his automobile. In the words of deputy Tomlinson, the following occurred:

> Vehicle was stopped on probable cause information that was obtained earlier in the day and continued up to the time of arrest. More than ten pounds of cannibus sativa L was found in the trunk of the vehicle. Defendant arrested, given his rights by Agent Tomlinson and booked in O.C. Jail. Bond $50,000.00 set by Judge Muszynski.

A two count information, and later an amended information, was filed against Quattry. He was charged with possession in excess of five grams of cannibus, and for unlawfully carrying a concealed firearm. The motion to Suppress Intercepted Wire Communications was timely filed, and denied by Circuit Judge W. Rogers Turner. Pursuant to plea bargaining Quattry entered a plea of nolo contendere to the possession charge. The firearm count was dismissed. Express reservation of the right to appeal the trial court's denial of the motion to suppress was made. Fla. R. Crim. P. 3.172(c)(iv). The plea was accepted. Quattry was sentenced to five (5) years probation with adjudication of guilt withheld.

Quattry then effected his direct appeal to the District Court of Appeal of Florida, Fourth District. He is presently on supersedeas bond.

THE QUESTIONS ARE SUBSTANTIAL

Questions One and Two

The questions raised by this appeal pursuant to 28 U.S.C.A. §1257(2) are indeed substantial federal questions, worthy of full plenary review by this Court. This Court has never addressed the constitutional and statutory parameters of state wiretap legislation *vis a vis* Title III, or more specifically 18 U.S.C.A. §2516(2).

In 1968, Congress promulgated Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 82 Stat. 211-225, 18 U.S.C.A. §§2510-2520. This legislation dealt exclusively with wiretaps and other forms of electronic surveillance. *Scott v. United States,* 436 U.S. 128, 130 (1978). Title III of the Omnibus Crime Control and Safe Streets Act essentially codified the limited constitutional exception permitted in allowing judicially authorized wiretaps as recognized by the Court's ruling in *Katz v. United States,* 389 U.S. 347 (1967) and *Berger v. New York,* 388 U.S. 41 (1967).

Essentially, federal legislation preempts this field. *See* 2 U.S. Code Cong. & Admin. News 2187 (1968). Under 18 U.S.C.A. §2516(2) the states are permitted to enact their own legislation, since Title III is not self executing, but their laws must not be less restricted than the federal act. *Id.* If the state law is more permissive, then it cannot stand in face of the federal statute which establishes the minimum standards regulating the state procedures. Thusly, the state statute must be found invalid as being repugnant to the federal law. *See generally Alderman v. United States,* 394 U.S. 165 (1969).

Section 934.07 of the Florida statutes, as applied, contravenes 18 U.S.C.A. §2516(2). The federal legislative intent is clear that a state cannot enact legislation except where a high level and publicly responsive individual makes the decision on an application for a wiretap order. 2 U.S. Code Cong. & Admin. News 2187 (1968). The Fourth District Court of Appeal has permitted an "officer," not contemplated by Congress, to be the applicant for a wiretap order, even where there is literally no policy making control by the highest prosecuting attorney over the decision to apply for the wiretap order.

There are important national interest considerations present in this case. The Supreme Court has never decided how far the states are allowed to divert from 18 U.S.C.A. §2516(2). Addressing this problem the Supreme Court could establish uniformity amongst the states, and conformity with Title III. Although the legislative intent behind section 2516(2) clearly was to allow the states freedom to designate their own officers with regard to nomenclature, but not to permit them leeway to undermine the centralization of authority and policy making determinations that are essential to wiretap procedures. Because of the failure of the Court to set some guidelines in this area, results as evidenced by the *Quattry* case will ever be present.

The interpretation given by the Fourth District Court of Appeal of Fla. Stat. §934.07 (1977), as gauged by 18 U.S.C.A. §2516(2), is different from that of the lower federal courts which have discussed the federal procedures under section 2516(1). In each of those cases the application for the wiretap was made by an attorney in charge of the criminal investigation requiring the wiretap; that is to say, either the United States Attorney, an assistant U.S. attorney, or an attorney with the Department of Justice. *See, e.g., United States v. McCoy,* 539 F.2d 1050 (5th Cir. 1976) (U.S. attorney); *United States v. Civella,* 533 F.2d 1395, 1399 (8th Cir. 1976), *vacated on other grounds sub nom.,*

United States v. Barletta, 430 U.S. 902 (1977) (special U.S. attorney); *United States v. Narducci,* 341 F. Supp. 1107, 1108 (E.D. Pa. 1972), *aff'd,* 500 F.2d 1401 (3rd Cir. 1974) (special attorney for Dept. of Justice). *But cf. United States v. Donnovan,* 429 U.S. 413 (1977) (FBI agent).

The federal cases are further clear in stating that the responsibility imposed upon that principal prosecuting attorney cannot be delegated to an officer not otherwise contemplated by section 2516 as being able to make the application. *See, e.g., United States v. Giordano,* 416 U.S. 505, 512-523 (1974); *United States v. Robinson,* 496 F.2d 225 (5th Cir. 1974), *on remand for evidentiary hearing,* 359 F. Supp. 52, 56 (S.D. Fla. 1973). This decision in *Quattry* is inconsistent with that rationale as it delegated authority to an individual not contemplated by the legislative intent of section 2516(2), or by the statute's plain language.

This lack in uniformity is further seen by various judicial decisions interpreting similar state statutes as Fla. Stat. §934.07 (1977). In *United States v. Tortorello,* 480 F.2d 764 (2nd Cir.), *cert. denied,* 414 U.S. 866 (1973) the court affirmed the district court's denial of the motion to suppress. Despite the *Tortorello* holding that a district attorney [similar to Florida's state attorney] did not have to personally appear, the court read the New York statute in light of Title III to require a procedure very different from that permitted in *Quattry.* The *Tortorello* court stated:

> The objective of the provision can be effectively attained by having the chief prosecuting officer pass on applications which his assistant prepare and, after he has approved them, having them presented to the issuing judge. *** [The district attorney's] assistants usually are in a better position to answer questions concerning probable cause, the only practical justification for requiring a personal appearance.

Id. at 777. *Accord, United States v. Carrubia,* 377 F. Supp. 1099, 1105 (E.D.N.Y. 1974).

In *Commonwealth v. Vitello,* 327 N.E.2d 819 (Mass. 1975), although affirming the denial of the suppression motion, the Court spoke to the question of who can and cannot apply for a wiretap order, *vis a vis* Title III.

> [I]n narrowly circumscribing those State enforcement authorities who may apply for wiretap orders, Congress sought to ensure uniform and consistent standards for wiretap orders. We take note of the fact that, in contrast to the procedure for search warrants in general, *investigative personnel may not themselves apply to a Judge for authority to wiretap or eavesdrop.*

Id. at 939 (emphasis added). *See State v. Siegel,* 266 Md. 256, 292 A.2d 86, 94-95 (Ct. App. 1972) (under Maryland law the state attorney applies for the wiretap). And in *State v. Farha,* 218 Kan. 394, 544 P.2d 341 (1975), *cert. denied,* 426 U.S. 949 (1976), this Court declined to review a Kansas supreme court decision which affirmed a suppression order where the Kansas statute did not comply with the requirements of Title III, and the Fourth Amendment. In clearly rejecting the argument accepted in *Quattry* that the state attorney only has to *authorize* the application, the *Farha* court stated:

> The difficulty with this contention is that under 18 U.S.C.A. §2516(2) only the attorney general (the principal prosecuting attorney of the state) is authorized to make the application. The statute makes no distinction between "authorizing" and "applying". Keeping in mind the expressed objectives of Title III . . . we think no such distinction should be made.

544 P.2d at 350.

Despite the rejection of Quattry's argument by the Fourth District Court of Appeal, another Florida appellate judge has stated that merely allowing the state attorney to *authorize* the making of an application under Fla. Stat. §934.07 violates 18 U.S.C.A. §2516(2). *See State v. McGillicuddy,* 342 So.2d 567, 570-571 (Fla. 2nd DCA 1977) (McNulty, C.J., dissenting).

Essentially, what is present in *Quattry* is the Florida statute being applied in such a manner that it directly rebukes the minimum protections set forth in 18 U.S.C.A. §§2516(1) and (2).

Such a holding by the Florida court is intolerable to a federal statutory scheme sensitive to the right of privacy. In only the most limited circumstances can privacy interests be invaded by a wiretap. This valued right of privacy recognized by the Constitution, and so scrupulously guarded by this Court, necessitate a full hearing in this cause and a definitive Court pronouncement regarding state legislation authorizing wiretaps. If not, the Court would, in effect, be sanctioning a disregard of uncontroverted Fourth Amendment protections due every citizen, without regard to their involvement or not in criminal activity. These constitutional guarantees are reflected in 18 U.S.C.A. §2516(2).

Surely Congress intended the states to have some freedom in structuring their laws. But that independence was limited so as to mandate the states to enact wiretap legislation more strictly confining than the federal act. Although Fla. Stat. §934.07 (1977) was intended to conform to the language of 18 U.S.C.A. §2516(2), *see United States v. Lanza,* 341 F. Supp. 405, 407-409 (M.D. Fla. 1972); 24 Fla. Stat. Ann., *Legislative Reference Bureau — 1969,* at 56 (1973), it does not. The section 934.07 language is loosely structured and unclear. Instead of placing limits on the statute as required by section 2516(2), Florida has tried to establish an "authorization" system similar to what is at

play in section 2516(1). But at the local level there is not the layered bureaucracy present as in the federal system where the centralization problem is much more difficult to handle. Even under §2516(1), as has been earlier noted, it is still the highest prosecuting attorney, or a designated assistant state attorney, who actually *makes* and *delivers* the application for judicial scrutiny. Section 934.07 permits a laxness in Fourth Amendment protections that is intolerable to 18 U.S.C.A. §2516(2).

QUESTION THREE

In his original motion to suppress Quattry argued that the affidavit of Deputy Tomlinson did not establish probable cause to support a wiretap since that affidavit was plagued by assertions "based entirely on double and triple hearsay." The trial court's order denied this motion. This point was preserved in the Assignments of Error, wherein Quattry asserted:

> The trial court erred in denying Defendant's Motion to Suppress Intercepted Wire Communications in that the Affidavit and Application For Intercepted Wire Communications failed to establish the requisite probable cause upon which the Order Authorizing Interception of Oral And Wire Communications was issued as the Affidavit and Application was based entirely on double and triple hearsay.

Point III of Quattry's brief to the Fourth District Court of Appeal argued this point:

> The trial court erred in denying the motion to suppress on the grounds that the affidavit of the sheriff's agent did not support a finding of sufficient probable cause to issue the wiretap order.

The judgment of that court was, in effect, that the affidavit demonstrated sufficient probable cause. Because of the multiple hearsay problem evident from the face of the affidavit, the lack of reliability and trustworthiness of the information the affiant received, plus the lack of personal knowledge of the affiant, the probable cause determination fell below those standards set by this Court which are constitutionally required of all affidavits. *See* Spinelli v. Texas, 393 U.S. 410, 415-418 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *See also* United States v. Fiorella, 468 F.2d 688, 691-692 (2nd Cir. 1972), *cert. denied*, 417 U.S. 917 (1974); United States v. Lanza, 341 F. Supp. 405, 414-416 (M.D. Fla. 1972).

The Court is respectfully requested to take jurisdiction over this non-appealable issue involving a federal right. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487 (1975); Flournoy v. Wiener, 321 U.S. 253, 263 (1944).

WRIT OF CERTIORARI

The Appellant Quattry requests that these papers on appeal be treated as a Petition for Writ of Certiorari, pursuant to 28 U.S.C.A. §2103, should this Court determine the appeal to have been improvidently taken.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA

STEVEN LEW QUATTRY, Appellant, v. STATE OF FLORIDA, Appellee.	4DCA Case No. 77-2254 Circuit Court Case No. CR76-1038

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that STEVEN LEW QUATTRY, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the District Court of Appeal for the Fourth District, State of Florida, affirming the denial of the Motion to Suppress Intercepted Wire Communications filed by the Appellant in the trial level, Circuit Court Ninth Judicial Circuit, in and for Orange County, Florida. The final judgment of the District Court of Appeal was entered August 9, 1978, and rehearing denied September 27, 1978.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

I hereby certify, under oath, that a true copy of the foregoing Notice Of Appeal has been served by United States mail, first class postage to John D. Cecillian, Assistant Attorney General, 214 Pan American Building, 307 North Dixie Highway, West Palm Beach, Florida 33401, and Jim Smith, Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304. I

hereby further certify, under oath, that I am a member of the Bar of the Supreme Court of the United States, and that true copies of the foregoing Notice Of Appeal has been served by U.S. Mail to all the parties required to be served.

/s/ Gerald S. Rutberg
GERALD S. RUTBERG, Esquire
Attorney for Appellant

STATE OF FLORIDA)
COUNTY OF SEMINOLE) ss.

Before me this day personally appeared GERALD S. RUTBERG, Attorney for Appellant, who, being duly sworn, deposes and says that all of the information stated in the certification paragraph of Appellant's Notice Of Appeal To The Supreme Court Of The United States is true and correct.

/s/ Gerald S. Rutberg
GERALD S. RUTBERG, Esquire
Attorney for Appellant
Law Offices of Rutberg & Roth
385 S. Highway 17-92
Post Office Box 977
Casselberry, Florida 32707
Phone: (305) 834-4774

SWORN to and subscribed before me this 26th day of June, 1979.

Priscilla J. O'Brien
NOTARY PUBLIC
State of Florida
My Commission Expires
Feb. 8, 1983

Steven Lew QUATTRY, Appellant,

v.

STATE of Florida, Appellee.

No. 77-2254.

District Court of Appeal of Florida,
Fourth District.

Aug. 9, 1978

Rehearing Denied Sept. 27, 1978.

Appeal from Circuit Court, Orange County;
W. Rogers Turner, Judge.

Larry M. Roth and Gerald S. Rutberg of
Rutberg & Roth, Casselberry, for appellant.

Robert L. Shevin, Atty. Gen., Tallahassee,
and John D. Cecilian, Asst. Atty. Gen., West
Palm Beach, for appellee.

PER CURIAM

AFFIRMED.

LETTS, MOORE and BERANEK, JJ., concur.

IN THE DISTRICT COURT OF
APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STEVEN LEW QUATTRY,

Appellant.

v.

STATE OF FLORIDA,

Appellee.

CASE NO.
77-2254

September 27, 1978

BY ORDER OF THE COURT:

ORDERED that the petition for rehearing filed August 24, 1978 is hereby denied; and further,

ORDERED that the Motion filed August 24, 1978 to certify question to the Supreme Court of Florida as being of great public interest is hereby denied.

A TRUE COPY

/s/ Clyde L. Heath
CLYDE L. HEATH
CLERK

cc: Larry M. Roth, Attorney
Attorney General

cms

SUPREME COURT OF FLORIDA

THURSDAY, APRIL 19, 1979

STEVEN LEW QUATTRY,	)	
	)	CASE NO. 55,397
Petitioner,	)	District Court
	)	of Appeal,
v.	)	Fourth District
	)	77-2254
STATE OF FLORIDA,	)	
	)	
	)	
Respondent.	)	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., BOYD, OVERTON, HATCHET and ALDERMAN, JJ., concur

A True Copy TC

TEST:

cc: Hon. Clyde L. Heath, Clerk
Hon. W. Rogers Turner, Judge
Hon. Randall P. Kirkland, Clerk

Sid J. White
Clerk Supreme Court

Gerald S. Rutberg, Esquire
Larry M. Roth, Esquire
John D. Cecilian, Esquire

By: /s/ Dulilliu Causseaux
Deputy Clerk

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA.

CRIMINAL ACTION NO. CR76-1038

STATE OF FLORIDA,

Plaintiff,

v.

STEVEN LEW QUATTRY,

Defendant.

_____/

DEFENDANT'S MOTION TO SUPPRESS INTERCEPTED WIRE COMMUNICATIONS

COMES NOW the Defendant, STEVEN LEW QUATTRY, by and through his undersigned counsel, and files this his Motion to Suppress Intercepted Wire Communications, and for good cause would show unto the Court as follows:

1. Assistant State Attorney, Rom W. Powell, served on Defendant, STEVEN LEW QUATTRY, by his undersigned attorney, by certified mail received on July 21, 1976, the following documents:

a. Affidavit and Application

In Re: Interception of Wire Communications of Mike A. Logan, Darla Runyan and Other Persons Unknown, to or from a Telephone Facility Number 305/273-1692 Listed to Darla Runyan at Bayone Road, Route 5, Box 984, Orlando, Orange County, Florida.

(See Exhibit A)

b. Authorization for Interception of Wire or Oral Communications (attached to Affidavit and Application) (See Exhibit B)

c. Order Authorizing Interception of Oral and Wire Communications (See Exhibit C)

d. Amendment to Order (See Exhibit D)

2. No Inventory was received in the mailed items referred to in enumerated paragraph one above, and to date no Inventory has been received by the Defendant or his attorney.

3. The Order Authorizing Interception of Oral and Wire Communications was dated April 12, 1976, by Circuit Judge B.C. Muszynski and was authorized for a period of thirty (30) days. The wiretap actually was in effect from April 12, 1976, through April 27, 1976. The above named Defendant was arrested on April 23, 1976.

4. The items identified in enumerated paragraph one (a-d) together with the Inventory comprise the entire documentary material prepared by the Circuit Judge, police personnel, and the State Attorney.

5. The Affidavit and Application (identified in this motion as Exhibit A) fails to establish probable cause based on the facts alleged therein because

a. The Affidavit is based entirely on double and triple hearsay. For example, in the Affidavit enumerated paragraph 4.(B) plus enumerated paragraph 4.(B), (2), (3), (4), (5), (6) relate what an alleged dealer "A" told informant "A" who allegedly related the information to Affiant Officer Ray A. Tomlinson. Informant "A" failed to have the requisite personal knowledge sufficient to support Tomlinson's application.

b. Further, the Affidavit shows that Affiant Tomlinson allegedly obtained information from an Agent Wood which information Agent Wood allegedly obtained from informant "B", said information coming from informant "B", who allegedly got his information from alleged dealer "B". See Affidavit enumerated paragraph 4.(G), (1), (2), (3),

(4), (5), (6), (7) plus enumerated paragraph 4.(H). Nowhere attached to the Application was there an Affidavit from Agent Wood and in effect Agent Tomlinson relies for probable cause on information three times removed from him. This is not a proper basis for obtaining a wiretap under Florida Statute 934, which statute established rigid requirements for obtaining a wiretap. Agent Tomlinson's Affidavit fails to meet minimum standards. Likewise, nowhere is there stated in the Affidavit why Agent Wood was unable or unavailable to execute an appropriate Affidavit. Even if Agent Wood had executed an Affidavit it appears it would likewise be subject to failure because of the informant's lack of personal knowledge.

6. The Authorization for Interception of Wire or Oral Communications (Exhibit B) is *prima facie* improper in that it does not meet requirements of Florida Statute 934.07. The Authorization is a failure because State Attorney Robert Eagan did not authorize an Application to a judge as required by law. Instead, the State Attorney erroneously authorized the Application of Agent Ray A. Tomlinson for an Order and said Authorization is fatally at variance with Florida Statute 934.07.

7. The Order Authorizing Interception of Oral and Wire Communications (Exhibit C) fails to identify that evidence of dealing in *narcotic drugs or other dangerous drugs* will result from the wiretap. The Judge's Order merely talks of the laws prohibiting possession and sale of controlled substances and thus the Court's language is at fatal variance with Florida Statute 934.

8. The interception was not made in conformity with the Order Authorizing Interception of Oral and Wire Communications in that the requirements of minimization were not adhered to or met. Copies of the wiretap tapes furnished to defense counsel include every phone conversation and, in fact, some phone conversations dealing with romances, tennis, and the like, and having nothing to do with drug trafficking were taped in their entirety. These conversations were clearly outside the scope of the Order and in violation of the standards established in *Rodriguez v. State*, 297 So. 2d 15 (1974).

According to the deposition of Agent Wood (see deposition of July 28, 1976, at p.p. 45-47) certain tapping minimization procedures were to be used. The actual tapes show that these procedures were, in fact, not used to accomplish minimization. For example, on tape 1 (A) there is a two and one-half (2½) minute conversation involving the picking up of two girls. There is another conversation of seven and one-half (7½) minutes duration talking about a fishing trip to the islands, boats, the price of the trip, U.F.O.'s, and catching fish. On the same tape there is a conversation dealing with furniture, leasing a couch and pricing. Likewise, there is a conversation of four and one-half (4½) minutes length between a Mike and a Carol talking about a description of land, love birds, beach, canal and lake shore. After a brief cut off there is a resumption of the tap which reveals a conversation about teeth and horses. On tape 2-1(B) there is a tap of approximately four (4) minutes dealing with a conversation of a gynecologist, missing dogs and lunch with mother. On this tape there are further interceptions of conversation dealing with pool screen caulking. On tape 2-3(A) there is a three minute twenty second conversation regarding horses, fifty (50) pounds of feed and feeding horses.

9. The procedures set down by the investigating authorities under the Order Authorizing Interception of Oral and Wire Communications (Exhibit C) to effect minimization as required by said Order were blatantly ignored. Some conversations which were clearly outside the scope of the Order lasted for several minutes and were not cut off at the prescribed time limit as set down in said procedures. Thus the agents violated their own Application.

10. The arrest of the Defendant and the other alleged participants resulting directly from the wiretaps was ac-

complished on April 23, 1976, however, the wiretap was continued through April 27, 1976, some four days after the objectives of the wiretap were allegedly achieved.

Because Florida Statute 934 is an infringement on basic constitutional rights the statute must be strictly construed and applied with painstaking precision. Neither of these requirements were met and the Court should enter its Order suppressing all intercepted wire communications upon which this cause is totally based.

RESPECTFULLY SUBMITTED this 15th day of February, 1977.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail/hand delivery to Donald A. Lykkebak, Esquire, Assistant State Attorney, P.O. Box 1673, Orlando, Florida 32802, this 15th day of February, 1977.

/s/ Gerald S. Rutberg
GERALD S. RUTBERG
385 S. Highway 17-92
P.O. Box 977
Casselberry, Florida 32707
Phone: (305) 834-4774
Attorney for Defendant

EXHIBIT A

IN THE CIRCUIT COURT FOR
ORANGE COUNTY, FLORIDA

WIO #76-

IN RE: INTERCEPTION OF WIRE COMMUNICATIONS OF MIKE A. LOGAN, DARLA RUNYAN AND OTHER PERSONS UNKNOWN, TO OR FROM A TELEPHONE FACILITY NUMBER 305/273-1692 LISTED TO DARLA RUNYAN AT BAYONE ROAD, ROUTE 5, BOX 984, ORLANDO, ORANGE COUNTY, FLORIDA.

AFFIDAVIT AND APPLICATION

STATE OF FLORIDA
COUNTY OF ORANGE

Before me, B. C. Muszynski, Judge of the Circuit Court of the Ninth Judicial Circuit for Orange County, Florida, personally appeared RAY A. TOMLINSON, who being by me first duly sworn, says:

1. Application is hereby made for an order authorizing interception of wire communications as hereinafter specified.

3. Affiant is a Deputy Shieriff in the Special Investigations Division of the Orange County Sheriff's Department. Affiant is empowered to conduct investigations of and to make arrests for offenses prohibited by Chapter 893, Florida Statutes, and is currently responsible for the investigation detailed herein involving the offenses of possession and sale of controlled substances, including but not limited to cannabis, commonly known as marijuana, which offenses are being carried on as a conspiracy and in

an organized manner, in violation of Chapter 893, and 777.04(3), Florida Statutes.

3. Affiant is authorized to make this application by ROBERT EAGAN, State Attorney of the Ninth Judicial Circuit of Florida.

4. The facts and circumstances relied upon by the Affiant which justify Affiant's belief that an order should be granted are as follows:

(A) Your Affiant is a Deputy Sheriff of the Orange County Sheriff's Department, and possesses a graduate degree in Theology, an Associate of Arts Degree and will possess a Bachelor of Science Degree with a major in Criminal Justice in June 1976. Your Affiant is a graduate of the 280 hour training program conducted by the J.C. Stone Memorial Academy of the Orlando Police Department from April 1970 to February 1971. Since October 1973, your Affiant has been employed with the Orange County Sheriff's Department and served in the Uniform Patrol Division from October 1973 until October 1974. In October 1974, your Affiant was assigned to Special Investigations Division working drug related cases. Your Affiant has personally made in excess of 50 undercover cases of narcotics and dangerous drugs and your Affiant was the author of in excess of 5 search warrant applications, which search warrants resulted in the arrests of in excess of 20 persons and the seizure of in excess of $50,000 worth of narcotic and other dangerous drugs. Your Affiant has received in excess of 500 hours of in-service training with 80 hours of that being a 2 week school at Broward Community College conducted by the Federal Drug Enforcement Agency. Your Affiant has also assisted in giving lectures to the Uniform Patrol Division of the Orange County Sheriff's Department concerning narcotics and dangerous drugs, and works under the supervision of Sgt. Melvin F. Sears of said department, who has 3 years experience in the investigation of drug cases. Sgt. Sears has personally instructed your Affiant as to the language, methods of operation, and proper

investigative techniques of illegal drug activities in Orange County.

(B) In January 1976, your Affiant and Agent Roger Freeman of the Orange County Sheriff's Department had occasion to discuss drug related activity with a reliable confidential informant, hereinafter called Informant "A", who in the past has provided more than 5 items of information, all of which have proven to be true and correct. Information from Informant "A" has resulted in the arrests of more than 2 persons for drug violations and the seizure of more than 100 pounds of cannabis valued in excess of $40,000.

(1) In January 1976, Informant "A" told Affiant and Agent Freeman of a major drug dealer by the name of MIKE LOGAN who was operating within Orange County and dealing mainly in cannabis throughout the Central Florida area. Informant "A" described the location of MIKE LOGAN's residence as being in the Isle of Pines area located near Moss Park in Orange County, Florida. Informant "A" took your Affiant and Agent Freeman to this area and pointed out said residence as being a house located on Bayonne Drive. Informant "A" stated that MIKE LOGAN lived in this house with his girl friend named "DARLA".

(2) Informant "A" told your Affiant that he had talked with a person herein referred to as Dealer "A", whose true name was given Affiant but is withheld so as to protect the identity of Informant "A". Informant "A" told Affiant that Dealer "A" told him that he was one of MIKE LOGAN'S street dealers, and that LOGAN has several persons whom he trusts to handle, sell and distribute large quantities of cannabis. Dealer "A" further stated to Informant "A" that he was one of those persons, and he made incriminating statements about himself and MIKE LOGAN. Dealer "A" told Informant "A" that on some occasions MIKE LOGAN had in exces sof 1000 pounds of cannabis at a storage point located within a mile of the

aforementioned residence on Bayonne Drive, and that Dealer "A" had seen LOGAN and the cannabis at this storage point.

(3) Dealer "A" told Informant "A" that he had been with MIKE LOGAN when LOGAN had been in personal contact with known narcotic and drug smugglers making arrangements for the purchase and delivery of large amounts of cannabis from these smugglers.

(4) Dealer "A" told Informant "A" that he has personally seen and heard MIKE LOGAN on the telephone at said residence located on Bayone Road talking with persons known to Dealer "A", as drug smugglers, arranging transactions of cannabis on the telephone which Dealer "A" stated was Area Code 305/273-1692.

(5) Dealer "A" further advised Informant "A" that MIKE LOGAN does not meet personally with any persons outside his organization in order to maintain a "close knit" organization and to prevent undercover officers or informants from infiltrating the organization.

(6) Dealer "A" further advised Informant "A" that MIKE LOGAN obtains very large quantities of cannabis from the Miami area and the Gainesville area from known smugglers.

(C) While lawfully executing a search warrant on December 3, 1975, at the residence of one RHETT MILES TAYLOR, a known narcotic and drug violator, your Affiant found the telephone number 305/273-4586 on a sheet of paper with names and telephone numbers of other persons known to Affiant as having prior criminal records for narcotic and drug violations. Next to this telephone number was written the name "MIKE LOGAN".

(D) In February 1976, after official request for telephone records, Affiant was told by telephone personnel that telephone number 305/273-4586 had been changed to 305/273-1692 and was listed to a DARLA RUNYAN at Bayone Road, Route 5, Box 984, Orlando, Florida.

(E) On March 16, 1976, pursuant to subpoena, your Affiant received and reviewed official Southern Bell Telephone & Telegraph Company toll records for telephone number 305/273-1692 for the months of December 1975 and January and February 1976. These revealed that said telephone number is listed to DARLA RUNYAN at Bayone Road, Route 5, Box 984, Orlando, Florida and that at least 3 calls originating from said telephone number were made to telephone number 904/375-1605, which number is known to Affiant to be the listed telephone number of one KELLY OGDEN in Gainesville, Florida. OGDEN is a known violator of the narcotic and other dangerous drug laws of the State of Florida, and is at liberty on bond after being arrested for possession of cannabis on January 30, 1975. On February 12, 1975, OGDEN was indicted by the State Wide Grand Jury investigating narcotics smuggling in the State of Florida, and said charge is still pending. STEVE COX, a Deputy Sheriff for the Orange County Sheriff's Department working with Affiant in connection with this investigation told your Affiant that he has personally seen OGDEN in the presence of one JAMES GREGORY MESLANKA of St. Petersburg, Florida, a known drug smuggler who was convicted for possession with intent to distribute approximately 9 tons of cannabis which has been seized by law enforcement officials in the Stein Hatchee, Florida area in 1972. Further, STEVE COX told Affiant that OGDEN has been seen by COX in the company of one MICHAEL HUBBARD, of St. Petersburg, Florida, reputed to be a major narcotic smuggler who was indicted by the State Wide Grand Jury on February 12, 1975.

(F) The aforesaid official telephone toll records further reflect that persons at telephone number 305/273-1698 were calling telephone number 904/255-2750 on December 20 and 27, 1975 and January 1, 1976. This latter telephone number is known by your Affiant to be the listed telephone number for one ROBERT W. RULE of Daytona Beach,

Florida. Lt. OULETTE of the Daytona Beach Police Department advised that ROBERT W. RULE is known to the Daytona Beach Department as a major drug violator, and that he was arrested on November 1, 1972, for conspiracy to unlawfully possess and sell a harmful drug. RULE is also known to the Daytona Beach Department as being a close associate of one ANDREW LEO DUKES of Daytona Beach, known to that department to be a drug dealer in the Daytona Beach area.

(G) Your Affiant has received information on April 5, 1976 from Agent LOUIS R. WOOD, of the Orange County Sheriff's Department who is also participating in this investigation, that WOOD over the past 6 months has met with a reliable confidential informant, hereafter referred to as Informant "B". WOOD stated that he and Informant "B" discussed the drug traffic in great detail. WOOD stated that Informant "B" gave him in excess of 20 items of information which have been confirmed through police and intelligence records. WOOD stated that he has come to know Informant "B", that the latter has given him extremely reliable information and that he has never received any information from this informant which has not been correct. Further, WOOD has through the use of Informant "B" been able to make 2 drug purchases while in an undercover capacity. Wtihin the past week, WOOD met with Informant "B" and discussed with him in detail a drug operation that is being conducted and supervised by MIKE LOGAN.

(1) On April 2 or 3, 1976, Informant "B" told WOOD that MIKE LOGAN resided at Bayone Road off Lake Mary Jane Road in the Southeast portion of the unincorporated area of Orange County. He stated that MIKE LOGAN is involved with known drug traffickers from Miami and Gainesville; that LOGAN deals in excess of 500 pounds of cannabis almost weekly.

(2) Informant "B" stated to WOOD that within the past 30 days he met with MIKE LOGAN at LOGAN'S

house on Bayone Road, and observed LOGAN making and receiving telephone calls on telephone number 305/273-1692 within the house which related to arrangements to sell 50 pounds of marijuana to a person hereafter referred to as Dealer "B", whose name was told to WOOD but is being withheld to protect the identity of Informant "B". Informant "B" stated that he knows Dealer "B" to be involved in drugs, having observed Dealer "B" deliver and receive cannabis and other types of drugs prior to the above-mentioned event taking place. Informant "B" told WOOD that he was present later on at a mobile home approximately one-half mile away when delivery of the 50 pounds of cannabis and exchange of money took place between MIKE LOGAN and Dealer "B".

(3) Informant "B" stated that within the past 45 days, he was present and observed MIKE LOGAN meet KELLY OGDEN in Alachua County, Florida and overheard the two men discussing a pending narcotics transaction. Informant "B" stated that he has overheard MIKE LOGAN refer to KELLY OGDEN as "the number 2 smuggler" in the United States.

(4) Informant "B" told WOOD that within the past 15 days, he was present and overheard MIKE LOGAN discussing a pending drug transaction over the telephone at telephone number 305/273-1692 with an unknown person who LOGAN later told Informant "B" was a large marijuana dealer from Miami, Florida. Informant "B" stated that the conversation lasted approximately 15 minutes and that marijuana bulk and prices were discussed with the amount to be purchased exceeding 100 pounds of marijuana.

(5) Informant "B" stated to WOOD that he was present at the residence on Bayone Road where MIKE LOGAN negotiated with a person referred to as Dealer "C", said person's name being known to WOOD but withheld in order to protect the identity of Informant "B".

LOGAN selling Dealer "C" 25 pounds of marijuana for in excess of $6,000 in U.S. Currency. Informant "B" told WOOD that the initial negotiations were conducted on telephone number 305/273-1692 in the residence on Bayone Road. Informant "B" said he knew Dealer "C" since he had purchased cannabis and other drugs from Dealer "C" previously. Informant "B" said that the above transaction occurred within the past 30 days.

(6) WOOD further stated that on one occasion between April 2 and April 7, 1976, he dialed telephone number 305/273-1692, and after handing the telephone to Informant "B", with Informant "B's" consent and utilizing an extension telephone, WOOD heard a conversation between a male person who identified himself as MIKE LOGAN and Informant "B". The substance of the conversation was that MIKE LOGAN and his brother RICHARD LOGAN were in possession of 300 pounds of cannabis and would be selling the same by the end of the week. LOGAN also stated that he was going to obtain several automatic firearms.

(7) WOOD further stated that he met with Informant "B" between the dates of April 2 and April 8, 1976, at which time Informant "B" stated he had been present in the residence on Bayone Road within the 5 days prior thereto when MIKE LOGAN had made and received in excess of 10 telephone calls from the telephone there from unknown persons where drug deals including prices and method of delivery were discussed.

(8) Your Affiant conducted surveillance of the residence at Bayone Road between the period of March 15 through April 1, 1976. Persons and vehicles have been observed coming to the residence. Two of those vehicles have been identified by Informant "A", according to information given him by Dealer "A", as being used in the transportation of illegal drugs. Subsequent to March 16, 1976, a 1969 Pontiac Stationwagon bearing 1976 Florida License number 7WW 19335, registered to MICHELLE LOGAN of

2022 North Lakemont Avenue, Winter Park, Florida, and a 1975 Chevrolet Pickup Truck, bearing 1976 Florida License plate 12G/K 10460, registered to MIKE A. LOGAN of 2022 North Lakemont Avenue, Winter Park, Florida, have been observed at the aforesaid residence on Bayone Road on more than 3 occasions. Affiant found it was impossible to maintain a closer constant surveillance on said residence for fear of alerting the occupants within or nearby neighbors whom Affiant believes are known by MIKE LOGAN and who would alert him to the presence of officers in the area.

5. The nature and location of the facilities from which, or the place where the communications are to be intercepted, is a telephone bearing number 305/273-1692, located within a residence at Bayone Road, Route 5, Box 984, Orange County, Florida.

6. The particular description of the type of communications sought to be intercepted is telephone conversations between DARLA RUNYAN, MIKE LOGAN and other persons unknown with whom illegal drug transactions and illegal drug related communications are made over the telephone, including but not limited to calling in orders for drugs, calling out to place orders for drugs, calls in reference to quotations and prices and qualities of drugs available, the time that drugs will be available, the type of drugs available, the places where drugs are available, and communications concerning drug storage, modes of transportation and details of importation of drugs into the State of Florida. Also, communications revealing the identity of any and all persons with whom illegal drug related activities are to be performed or have been performed which will reveal the identities of persons engaged with DARLA RUNYAN and MIKE LOGAN in a conspiracy to violate Chapter 893, Florida Statutes.

7. The identity of the person or persons committing the offenses of possession and sale of controlled substances, or conspiracy to commit the same, and whose com-

munications are to be intercepted are DARLA RUNYAN, MIKE LOGAN, KELLY OGDEN and other persons unknown.

8. Other investigative procedures have been tried and were unsuccessful and appear unlikely to succeed in the future if tried, or appear to be too dangerous if tried because:

(A) Visual surveillance would be and has been impracticable because of the inaccessible location of the residence on Bayonne Drive in an area where there are few other dwellings, and for the reasons heretofore mentioned.

(B) The execution of search warrants would be impracticable because MIKE LOGAN is believed to possess drugs at one or more unknown locations other than the aforesaid residence and storage point mentioned above, and that the drugs remain in these locations only a short period of time before they are sold.

(C) The Informants mentioned above have stated that they would not testify because they fear for their lives and personal safety should their identities become known.

(D) The use of undercover agents would not be practicable, as MIKE LOGAN will not meet and deal with persons that he has not known for a long period of time and who are not readily recognizable to him.

(E) Issuance of subpoenas, taking sworn testimony and grants of immunity would, in Affiant's opinion, compromise the investigation, reveal the informants' identities and would not produce dependable witnesses for prosecution.

(F) The investigation conducted thus far has revealed no facts or evidence concerning the other unknown conspirators involved in the illegal drug operation other than MIKE LOGAN and the few additional mentioned herein. Having exhausted all methods of investigation at this particular level of the operation, for the reasons stated herein above, Affiant submits that electronic surveillance is

the only alternative to utilize in obtaining the necessary existence and whereabouts of these unknown conspirators and to obtain evidence against DARLA RUNYAN and MIKE LOGAN and said unknown co-conspirators.

9. Your Affiant believes that additional communications of the same type as are hereinabove more particularly described will occur after the first communication has been obtained in that the facts of this investigation as set forth herein show that MIKE LOGAN is confederated with other persons in a complex and continuing criminal conspiracy, the nature of which necessarily requires numerous contacts over an extended period of time, and termination of the interception after receipt of the first communication would be premature and would result in failure to ascertain the nature and extent of the offenses herein involved and the identity and whereabouts of the co-conspirators of MIKE LOGAN. Your Affiant therefore requests that interception be authorized to be maintained until such time as communications have been intercepted which fully reveals the identity and whereabouts of the said MIKE LOGAN'S co-conspirators; the exact manner and means which have been, are being, and are about to be used to violate the laws of the State of Florida prohibiting the possession and sale of controlled substances, and conspiracy to commit the same; and the nature and extent of the conspiracy and illegal enterprise being engaged in by MIKE LOGAN and person or persons as yet unknown, or for a period of thirty (30) days from the date of any interception order entered herein, whichever date is earlier.

10. No previous application has been made to any judge for authorization to intercept, or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified herein to the knowledge of your Affiant.

WHEREFORE, Affiant requests that an order be issued herein authorizing the Sheriff of Orange County and/or

any of his lawful deputies, and any Special Agent of the Florida Department of Criminal Law Enforcement, working in conjunction, and with such proper and necessary assistance as the exigencies of the occasion may demand, including, but not limited to such cooperation and assistance as may be required and necessary from the Southern Bell Telephone and Telegraph Company in providing information, lines or facilities, to intercept wire communications to, on and from telephone number 305/273-1692, listed to DARLA RUNYAN, Bayone Road, Route 5, Box 984, Orlando, Orange County, Florida, by the use of such electronic, mechanical or other devices which may be necessary, including but not limited to recorders, amplifiers, voice activators, telephone number decoders and printers, in order that the said wire communications of MIKE LOGAN, DARLA RUNYAN and his unknown co-conspirators as specified herein may be procured for use as evidence in the prosecution of said persons.

/s/ Ray A. Tomlinson
Affiant

SWORN TO AND SUBSCRIBED TO BEFORE ME this 12th day of April, 1976.

/s/ B. C. Muszynski
CIRCUIT JUDGE

EXHIBIT B

STATE OF FLORIDA)
) SS
COUNTY OF ORANGE)

AUTHORIZATION FOR INTERCEPTION
OF WIRE OR ORAL COMMUNICATIONS

The undersigned, ROBERT EAGAN, being the duly elected State Attorney for the Ninth Judicial Circuit for the State of Florida, does, pursuant to Section 934.07, Florida Statutes, Hereby Authorize the Application of Agent Ray A. Tomlinson, Special Investigations Division, Orange County Sheriff's Department, for an Order of the Ninth Judicial Circuit of Florida, Authorizing the Interception of Wire or Oral Communications on telephone number 305-273-1692.

/s/ Robert Eagan
ROBERT EGAN, STATE ATTORNEY
FOR THE NINTH JUDICIAL
CIRCUIT FOR THE STATE
OF FLORIDA

SWORN TO AND SUBSCRIBED BEFORE ME THIS 12th DAY OF APRIL, 1976.

/s/ Sandra Fulton Masto
Notary Public State of
Florida at Large
My Commission Expires
Mar. 8, 1979

EXHIBIT C

IN THE CIRCUIT COURT FOR
ORANGE COUNTY, FLORIDA

WIP #76—

IN RE: INTERCEPTION OF WIRE COMMUNICATIONS OF MIKE A. LOGAN, DARLA RUNYAN AND OTHER PERSONS UNKNOWN, TO OR FROM A TELEPHONE FACILITY NUMBER 305/273-1692 LISTED TO DARLA RUNYAN AT BAYONE ROAD, ROUTE 5, BOX 984, ORLANDO, ORANGE COUNTY, FLORIDA.

ORDER AUTHORIZING INTERCEPTION OF ORAL AND WIRE COMMUNICATIONS

IN THE NAME OF THE STATE OF FLORIDA TO: The Sheriff of Orange County and/or any of his lawful deputies:

WHEREAS, RAY A. TOMLINSON, Deputy Sheriff, Orange County Sheriff's Department has this day made oath and affidavit before me, the undersigned Judge of the Circuit Court of the Ninth Judicial Circuit of Florida for an order authorizing interception of oral and wire communications pursuant to Chapter 934, Florida Statutes, and full consideration having been given thereto, this Court does find and determine upon the basis of the facts submitted by the Applicant as follows:

1. This Court has proper jurisdiction to enter the order sought, the Applicant herein is a proper person duly empowered by law to make such application, and the application has been duly authorized by the Honorable Robert Eagan, State Attorney of the Ninth Judicial Circuit of Florida;

2. there is probable cause to believe that the Laws of the State of Florida prohibiting possession and sale of controlled substances, to-wit: Chapter 893, Florida Statutes, and conspiracy to commit such offenses, to-wit: Chapter 893, and 777.04(3), Florida Statutes, have been, are being, and are about to be violated in an organized manner by DARLA RUNYAN, MIKE LOGAN and other person or persons unknown who are conspiring with them to commit the aforesaid offenses;

3. there is probable cause to believe that particular communications evidentiary of the commission of these offenses will be obtained by reason of and through the interception herein applied for;

4. that normal investigative procedures have been tried and have failed and, if tried, are unlikely to succeed, are dangerous, and in fact, are likely to prematurely compromise the investigation of the aforementioned offenses enumerated in paragraph 2 above;

5. there is probable cause to believe that the facilities from which the oral and wire communications are to be intercepted, to-wit: a telephone instrument bearing telephone number 305/273-1692, said telephone being listed in the official records of Southern Bell Telephone and Telegraph Company in the name of DARLA RUNYAN, and installed at Bayone Road, Route 5, Box 984, Orlando, Orange County, Florida, said premises being occupied by, and said facility being under the control of commonly used by DARLA RUNYAN and MIKE LOGAN, has been, is being, and is about to be used in connection with the commission of the aforesaid offenses in violation of the laws of the State of Florida.

WHEREFORE, it is hereby ordered that:

(A) The identity of the persons whose oral and wire communications are hereby authorized to be intercepted are DARLA RUNYAN, MIKE LOGAN and any person or per-

sons unknown conspiring with them in the commission of the aforesaid offenses;

(B) the nature and location of the communication facility from which the oral and wire communications are herein authorized to be intercepted is that certain telephone instrument bearing the number 305/273-1692, listed in the official records of the Southern Bell Telephone and Telegraph Company in the name of DARLA RUNYAN, and being installed at Bayone Road, Route 5, Box 984, Orlando, Orange County, Florida;

(C) the particular oral and wire communications sought and herein authorized to be intercepted are telephone conversations between DARLA RUNYAN, MIKE LOGAN and other person or persons unknown conspiring with them with whom illegal drug transactions and illegal drug related communications are made over the telephone, including but not limited to calling in orders for drugs, calling out to place orders for drugs, calls in reference to quotation and prices and qualities of drugs available, the times that drugs will be available, the type of drugs available, the places where drugs are available, and communications concerning drug storage, modes of transportation and details of importation of drugs into the State of Florida. Also, communications revealing the identity of any and all persons with whom illegal drug related activities are to be performed or have been performed which will reveal the identities and whereabouts of persons engaged with DARLA RUNYAN and MIKE LOGAN and others in a conspiracy to violate Chapter 893, Florida Statutes;

(D) the Sheriff of Orange County and/or any of his lawful deputies, with such proper and necessary assistance as the exigencies of the occasion may demand, including but not limited to such cooperation and assistance as may be required or necessary from the Southern Bell Telephone and Telegraph Company in providing information, lines or facilities, is hereby authorized to intercept oral and wire communications as are particularly described in sub-

paragraph (C) above, to, on and from the above described telephone number 305/273-1692, listed to DARLA RUNYAN and installed at Bayone Road, Route 5, Box 984, Orlando, Orange County, Florida, by the use of such electronic, mechanical or other device as may be necessary, including but not limited to recorders, amplifiers, voice activators, telephone number decoders and printers;

(E) such interception shall not terminate automatically when the type of communication particularly described above shall have been first obtained, but is hereby authorized to continue until such time as oral and wire communications over the above mentioned telephone instrument have been intercepted which fully reveal the exact manner and means which have been, are being, and are about to be used to violate the above mentioned laws by DARLA RUNYAN, MIKE LOGAN and their co-conspirators; the identity and whereabouts of such co-conspirators, and the nature and extent of the conspiracy being engaged in by them; or for a period of thirty days from the date of this order, whichever date is earlier;

(F) this order granting authorization to intercept wire and oral communications shall be executed as soon as practicable, and it shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under the provisions of Chapter 934, Florida Statutes and this order; it shall terminate upon a completion of the objective herein authorized, or in any event in thirty days from the date and time of this order;

(G) an appropriate representative from the Special Investigations Division, Orange County Sheriff's Department, participating in and familiar with this intercept shall report to me on or about the seventh day following the date of this order and on or about every five days thereafter until termination of the interception, showing what progress has been made toward the accomplishment of the authorized objective, and the need for continued interception. Agent RAY A. TOMLINSON, Orange County Sheriff's Depart-

ment, shall have custody of the original application and affidavit, the original of this order and of any other papers filed herein, and all tape recordings made pursuant hereto, to safely keep the same until further order of this court or of a court having competent jurisdiction herein.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida, this 12th day of April, 1976.

/s/ B. C. Muszynski
CIRCUIT JUDGE

EXHIBIT D

IN THE CIRCUIT COURT FOR
ORANGE COUNTY, FLORIDA
WIP #76—

IN RE: INTERCEPTION OF WIRE COMMUNICATIONS OF MIKE A LOGAN, DARLA RUNYAN AND OTHER PERSONS UNKNOWN, TO OR FROM A TELEPHONE FACILITY NUMBER 305/273-1692 LISTED TO DARLA RUNYAN AT BAYONE ROAD, ROUTE 5, BOX 984, ORLANDO, ORANGE COUNTY, FLORIDA.

AMENDMENT TO ORDER

This Court in its Order authorizing interception of ora[1] and wire communications dated April 12, 1976, by the reference to Southern Bell Telephone and Telegraph Company in paragraph (D) thereof did not find, nor did it mean to imply that such company was a party to the Application for this Order or the implementation thereof. Accordingly, it is

ORDERED that the words:

> "... including but not limited to such cooperation and assistance as may be required or necessary from the Southern Bell Telephone and Telegraph Company in providing information, lines or facilities, ..."

appearing at page 3, paragraph (D) of said Order are hereby deleted.

DONE and ORDERED at Orlando, Orange County, Florida, this 13th day of April, 1976.

/s/ B. C. Muszynksi
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA.

CASE NO. AMENDED CR76-1038

STATE OF FLORIDA,
Plaintiff,

vs.

STEVEN QUATTRY,
Defendant.

_____/

ORDER

THIS cause came before the Court on this date upon a consideration of the Defendant's Motion To Suppress Intercepted Wire Communications, which Motion was, by agreement of counsel, submitted on the question of law involved without the presentation, of testimony or further argument on legal authorities. The Court has considered said Motion, with its attachments, and it is thereupon,

ORDERED AND ADJUDGED that the Defendant's Motion To Suppress Intercepted Wire Communications be and the same is hereby DENIED.

DONE AND ORDERED in Chambers, Orlando, Orange County, Florida, this 28th day of February, 1977.

/s/ W. Rogers Turner
W. ROGERS TURNER, CIRCUIT JUDGE

Copies to:
Gerald Rutberg, Esq., P.O. Box 977, Casselberry, Fla. 32707
Donald A. Lykkebak, Assistant State Attorney

AMENDED
INFORMATION # CR76-1038

DIVISION TURNER

1) POSSESSION OF CANNABIS

2) CARRYING CONCEALED FIREARM

IN THE CIRCUIT COURT FOR
ORANGE COUNTY, STATE OF FLORIDA

AMENDED

THE STATE OF FLORIDA

VS.

STEVEN QUATTRY

_____

_____

_____

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

ROBERT EAGAN, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, CHARGES that On the 23rd day of April, 1976 in said County and State, STEVEN QUATTRY did, in violation of Florida Statute 893.13(1)(e), unlawfully possess in excess of five (5) grams of Cannabis, commonly known as Marijuana, a substance controlled by Florida Statute 893.03(1)(c).

COUNT TWO

AND ROBERT EAGAN, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Orange County, further CHARGES that on the 23rd day of April, 1976, in said County and State, STEVEN QUATTRY did, in violation of Florida Statute 790.01, unlawfully carry a concealed firearm, to-wit: a pistol, on or about his person.

Amended Statute
from 893.03(1)(e)
to 893.03(i)(c) on
last line of Ct. 1

Send copy to
attorney

/s/ Donald A. Lykkebak
DONALD A. LYKKEBAK, ASSISTANT
ROBERT EAGAN, State Attorney
Ninth Judicial Circuit of Florida

Bond $2,500.00

29-64 (5/75)

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me DONALD A. LYKKEBAK, Assistant State Attorney of the Ninth Judicial Circuit of Florida, who being first duly sworn, says that he certifies that he has received testimony under oath from the material witness or witnesses for the offense and that he institutes the prosecution in good faith.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13 day of January, 1977.

/s/ _____
Notary Public

Bond $2,500.00

Supreme Court, U. S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

CASE NO. 79-80

STEVEN LEW QUATTRY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM DISTRICT COURT OF APPEAL
OF FLORIDA - FOURTH DISTRICT

MOTION TO DISMISS OR AFFIRM

JIM SMITH
Attorney General of Florida

JOHN D. CECILIAN
Assistant Attorney General of Florida

ROBERT L. BOGEN
Assistant Attorney General of Florida

Elisha Newton Dimick Building
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401

Counsel for Appellee

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

CASE NO. 79-80

STEVEN LEW QUATTRY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Florida, by and through undersigned counsel, hereby moves this Court to dismiss and/or affirm the above-styled cause because it does not raise a substantial federal question; the federal question was not timely and properly raised, and the judgment rests on an adequate non-federal ground.

INTRODUCTORY STATEMENT

Appellee does not agree with Appellant's Introductory Statement found on page 1 of his Jurisdictional Statement. The Fourth District Court of Appeal affirmed the ruling of the lower court without opinion. Contrary to Appellant's assertion, there is nothing in the opinion which would support Appellant's claim regarding the Fourth District's specific holding. Appellee submits that the most that can be said of the Fourth District's decision is that the appellate court found the instant facts complied with §934.07 Fla. Stat.

JURISDICTION

Appellant has claimed that the "Fourth District Court of Appeal upheld the validity of Fla. Stat. §934.07 (1977) against the challenge of its being repugnant to 18 U.S.C.A. §2516(2)." It is Appellee's position that there was no challenge and this Court is therefore without jurisdiction.

Appellee points out that this Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented. Dept. of Mental Hygiene of California v. Kirchner, 380 U.S. 194 (1965). The burden is on the party seeking review to show that this Court has jurisdiction of the case. Id. To vindicate jurisdiction, the inquiry is whether the question was presented in such a manner that it was necessarily decided

by the appeals court when it affirmed the conviction. If the question was not so presented, then this Court has no power to consider it. Street v. New York, 394 U.S. 576 (1969). When the Appellant fails to show any timely insistence was made in the State courts that a state statute as applied is repugnant to the federal Constitution; treaties or laws, the appeal must be dismissed. Slagle v. Ohio, 366 U.S. 259 (1961).

In the instant case, it is quite apparent that Appellant never raised the federal question in the State Court. From an examination of his own excerpts in the State Court proceedings (at p.6-7 of Appellant's Jurisdictional Statement), the only clear claim that Appellant presented was that the situation in the instant case did not comply with the applicable Florida Statute. He analogizes to

the federal statute but never makes the argument that the facts applied to the state statute would be in contravention of the federal statute. Without such a claim plainly presented, the above-cited cases require this Court to refrain from hearing this case.

To buttress this argument further, Appellee cites a portion of Appellant's State Appeal Brief which was partially alluded to by Appellant in his Jurisdictional Statement at page 8. Appellant cited the following to demonstrate he raised a federal question:

> Section 2516(2) of Title III requires that the principal prosecuting attorney is the only party permitted to apply to the judge for an order. Thus, §934.07 must comply accordingly. If it permits less, then the statute must be invalid. [Id. at 40].

However, he failed to include the next two sentences which followed the above

quote:

> But without having to reach this question, since §934.07 contains no language contrary to §2516(2), then the provisions of this latter enactment must be said to be contained in the former. This is entirely consistent with the general discussion in United States v. Lanza, supra, 341 F. Supp. at 410-411, which recognized that §934.07, in fact, enacted more stringent rules than §2516, and affords more protection.

At best, Appellant merely mentioned the possible invalidity of the state statute in passing. That would not be sufficient for purposes of jurisdiction. See De Backer v. Brainard, 396 U.S. 28 (1969). Furthermore, Appellant informed the State Appeal Court in his brief that the question did not have to be reached. (Appellant's Brief, supra.) Obviously, he has failed to timely and properly present the federal question.

Even assuming that Appellant properly raised the question, this Court is

still without jurisdiction since the state court opinion could rest on an adequate non-federal ground. When the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Durley v. Mayo, 351 U.S. 277 (1955); Stembridge v. Georgia, 343 U.S. 541 (1951). This Court is without jurisdiction when the question of the existence of an adequate state ground is debatable. Id. It is presumed that the state statute will be construed in such a way as to avoid the constitutional question presented. Poulos v. New Hampshire, 345 U.S. 395 (1953); Fox v. Washington, 236 U.S. 273 (1915). Here, where Appellant acknowledged to the State Court that the validity question need not be reached, it is

apparent that he admitted that the decision could rest on an adequate state ground.

As a final note, Appellee submits that Appellant's federal question is insubstantial, frivolous and lacking sufficient merit for this Court to review it. Appellant's essential contention is that the authorizing officer himself has to make the application to the court. A plain reading of both the federal and state statute demonstrates his contention to be false.

Both 18 USCA §2516 and F S §934.07 are entitled "Authorization for interception of wire or oral communication." Under this heading one finds the necessary requirements for Authorization. Both federal and state statute allude to a later section, the federal specifically, the state generally. Those

sections 18 US §2518 and F S §934.09 are entitled "Procedure for interception of wire or oral communications." Under this heading one finds the necessary procedure involved in obtaining a lawful wiretap.

Each application shall include the following information:

> (a) The identity of the investigative or law enforcement officer making the application and the officer authorizing the application 18 USCA §2518 (1) (a), F S §934.09 (1) (a)

The above procedure is referring to two distinct people who have to be identified: the person making the application who is a law enforcement officer, and the officer who is authorizing the application, in this case, the State Attorney. Clearly the statutory procedures do not require the State Attorney to fill both roles. This is common sense. Surely,

the authorizing officer is not the primary source of knowledge in this area. Whatever enlightenment he could give the court would be second-hand. United States v. Turner, 538 F. 2d 143 (9th Cir. 1975).

The intent of Congress in passing this statute was to centralize in a publicly responsible official subject to the political process the formation of law enforcement policy on the use of electronic surveillance techniques and to insure that should abuses occur, the lines of responsibility will lead to an identifiable person. United States v. Giordano, 416 U.S. 505 (1974). This intent is clearly not circumvented by a law enforcement officer making application to the court after a proper authorization by the State Attorney.

CONCLUSION

Because Appellant has failed to timely and properly raise the issue in the State Court, the State Court opinion rests on an adequate non-federal ground, and the question presented is not substantial, Appellee respectfully requests this Court to dismiss and/or affirm the instant appeal.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

JOHN D. CECILIAN
Assistant Attorney General

ROBERT L. BOGEN
Assistant Attorney General
111 Georgia Avenue, Rm. 204
West Palm Beach, FL 33401
Telephone (305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been furnished, by mail, to Larry M. Roth, Esquire, Law Offices of Rutberg and Roth, 385 S. Highway 17-92, P.O. Box 977, Casselberry, Florida 32707, this _____ day of _____, 1979.

_____
JOHN D. CECILIAN
Of Counsel

_____
ROBERT L. BOGEN
Of Counsel